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NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER 1994 TERM

LEBARON DENNIS,

PETITIONER

V.

AUDREY DENNIS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fifth Circuit applied the correct standard for a review of a dischargeability question under Title 11.

2. Whether the doctrine of collateral estoppel should be applied in a dischargeability case arising out of a debt created by a divorce proceeding.

PARTIES TO THE PROCEEDING

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Respondent

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Petitioner

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lebaron Dennis, respectfully petitions this Court for a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals For the Fifth Circuit.

JURISDICTION:

The Petitioner files this Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit from a decision rendered on July 13, 1994 in the case of Dennis v. Dennis (In re: Dennis), 3

F.3d 274 (5th Cir. 1994). This Court has jurisdiction over this application pursuant to 28 U.S.C. § 1254.

STATUTES SET OUT VERBATIM

28 U.S.C. § 1738 provides:

> State and Territorial statutes and judicial proceedings; full faith and credit
>
> The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall by proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if

a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1254, provides:

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal

case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

11 U.S.C. § 523 (a)(5) provides:

§ 523. Exceptions to Discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt---

(5) to a spouse, former spouse, or child of the debtor, for

alimony to maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that---

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security

Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

STATEMENT OF THE CASE

By Final Decree Of Divorce dated July 23, 1986, the Debtor and Audrey Dennis obtained a divorce in Cause No. 85-CI-12933 in the 225th Judicial District Court of Bexar County, Texas. The Final Decree Of Divorce included a provision that Audrey Dennis would receive 50% of the military retirement benefits of LeBaron Dennis.

After the Debtor and Audrey Dennis divorced, the Debtor agreed to pay income taxes on all military retirement benefits received by Audrey Dennis. The Debtor sought to have the obligation to pay taxes discharged in the bankruptcy court. Audrey Dennis contended that the obligation to pay taxes is nondischargeable under § 523(a)(5) of the Bankruptcy Code, 11 U.S.C.A. § 523(a)(5), because it is allegedly a debt "for alimony to, maintenance for, or support of" a former spouse. The Debtor argued that the agreement to pay taxes was intended to provide support or maintenance to Audrey

Dennis.

The Debtor testified that he agreed to pay income taxes only to insure that, should Audrey Dennis predecease him, the Debtor would then receive the military retirement benefits currently paid to Audrey Dennis. The military retirement benefits were to be paid into a constructive trust in the name of the Debtor, and then one-half of the benefits would be transferred to Audrey Dennis. The Debtor agreed to pay all taxes on the military retirement benefits paid into the trust, because the Debtor believed that under this arrangement he would receive 100% of the military retirement benefits should Audrey Dennis predecease him. The Debtor subsequently discovered that it was not necessary to create a constructive trust in order to protect a reversionary interest in the military retirement benefits.

The Debtor's agreement to pay income taxes was contained in three letters prepared after the entry of the Final Decree Of

Divorce. The Debtor contends that the three letters contain an agreement to pay taxes that is separate and apart from any agreement contained in the Final Decree Of Divorce.

A judgment was entered on January 3, 1992, in a state court action filed by Audrey Dennis against the Debtor, Cause No. 198503 ("State Court Action") in County Court at Law Number 8 of Bexar County, Texas, for failure to pay the income taxes. The State Court Judgment contains the following findings:

> The Court finds that the Dr. LeBaron Dennis breached his agreement to assume responsibility for paying the tax on the gross pension benefit of his income and to report it as his income and pay all taxes due thereon.
>
> The Court finds that the agreement was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support.

The State Court Judgment was a consent judgment signed by the attorney for Audrey Dennis.

On January 7, 1992, the Debtor filed a

case under Chapter 7 of Title 11 of the United States Code, in the United States Bankruptcy Court ("Bankruptcy Court") for the Western District of Texas, San Antonio Division, which was docketed under case no. 92-50122.

On February 19, 1992, the Debtor as Plaintiff filed in the Chapter 7 Case Adversary Proceeding Number 92-5033 ("Adversary Proceeding") naming Audrey Dennis as Defendant. The Debtor sought in the Adversary Proceeding to obtain a determination that his obligation to pay income taxes was dischargeable in the Chapter 7 Case. Audrey Dennis filed counterclaims in the Adversary Proceeding alleging that the obligation to pay income taxes was nondischargeable under §§ 523(a)(4) and (5).

A trial was held in the Adversary Proceeding on October 19, 1992, and the Bankruptcy Court ruled that the debt was nondischargeable under § 523(a)(5). The Bankruptcy Court rejected the argument of

Audrey Dennis that was based on § 523(a)(4).

On October 26, 1992, the Bankruptcy Court signed the Judgment ("Adversary Proceeding Judgment") in the Adversary Proceeding. On November 6, 1992, the Debtor filed in the Adversary Proceeding a Motion For Reconsideration Or, In The Alternative, To Amend Judgment ("Motion For Reconsideration"). On December 18, 1992, the Bankruptcy Court signed its Order Denying Motion by which the Bankruptcy Court denied the Motion For Reconsideration.

The Debtor then perfected an appeal to the United States District Court ("District Court") for the Western District of Texas, San Antonio Division. On August 12, 1993, the District Court signed an Order ("District Court Order") that reversed and rendered the Adversary Proceeding Judgment of the Bankruptcy Court. Under the District Court Order, the "obligation of LeBaron Dennis to pay taxes on pension benefits" was discharged.

Audrey Dennis perfected an appeal to the United States Court of Appeals for the Fifth Circuit from the decision of the District Court. The Court of Appeals reversed and rendered judgment in favor of Audrey Dennis on July 13, 1994 in the case styled *In the Matter of LeBaron Dennis (In re: Dennis)*, 25 F.3d 274 (5th Cir. 1994).

LeBaron Dennis now seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit for a review of the decision.

JURISDICTION OF ORIGINAL COURTS

The United States Bankruptcy Court for the Western District of Texas had federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 151, 157 and 1334. The United States District Court and the United States Court of Appeals for the Fifth Circuit had federal subject matter jurisdiction pursuant to 28 U.S.C. § 158.

ARGUMENT

The Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because the Court of Appeals has rendered a decision in conflict with a decisions of another court of appeals.

1. Whether the Court of Appeals for the Fifth Circuit applied the correct standard for a review of a dischargability question under Title 11.

A. THE DENNIS DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS ON THE APPLICATION OF THE JUDGMENT

In the decision of *Dennis v. Dennis*, 3 F.3d 274 (5th Cir. 1994), the United States Court of Appeals for the Fifth Circuit rejected the application of the doctrine of collateral estoppel and held that the factors announced in *In re: Joseph*, 16 F.3d 86 (5th Cir. 1994) should be the factors considered by a bankruptcy court in determining whether payments characterized clearly and unambiguously in a divorce decree as property division should be deemed as "in the nature of support" for purpose of dischargeability under federal bankruptcy law.

In the *Dennis* case, a judgement of the courts of the State of Texas was under review for determination of whether the debt created by the judgment was dischargeable. In the *Dennis* case, the Court of Appeals stated described the judgment to be reviewed for dischargability as follows:

The Texas county court, referring to

language in the divorce decree, found that LeBaron's agreement to pay the taxes 'was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support'." *In re: Dennis*, 3 F.3d at 277.

The Court of appeals further noted that "This language mirrors, almost verbatim, the language in the divorce decree." *Id.*

In reversing and rendering judgment in favor of the appellant, the Court of Appeals rejected the Petitioner's argument that the doctrine of collateral estoppel applies to the case and determined that the considerations that should guide the court in determining the issue of dischargeability are the factors that the court announced in *In re: Joseph*, 16 F.3d 86 (5th Cir. 1994).

The court, citing *In re: Joseph*, supra, then announced the relevant considerations that bankruptcy courts should review in deciding whether a divorce obligation

constitutes alimony, maintenance or support: " The considerations include the parties' disparity in earning capacity, their relative business opportunities, their physical condition, their educational background, their probable future financial needs, and the benefits each party would have received had the marriage continued." *In re: Dennis*, 3 F.3d at 279 (citing *In re: Joseph*, 16 F.3d at 88).

This decision squarely conflicts with the decision of the United States Court of Appeals for the Tenth Circuit in *Yeates v. Yeates*, 807 F.2d 874 (10th Cir. 1986), and of the United States Court of Appeals for the Fourth Circuit in *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986).

In the *Yeates* case, the Court of Appeals for the Tenth Circuit was presented with the question of the correct legal standard for a bankruptcy court to determine whether a debt arising from a divorce is dischargeable.

In *Yeates* case, the Debtor spouse was sued by his ex-wife claiming that an agreement to make payments on a mortgage was in the nature of support. 807 F.2d at 876. The agreement provided, inter alia, that ". . . the parties agree to complete a loan with Transamerica Financial Services in the amount of $6,000.00 to be secured against the above home and shall be paid by [debtor] in consideration of Plaintiff waiving her right to alimony. *Id.*

The Tenth Circuit held that the initial inquiry is "to ascertain the intention of the parties at the time they entered the stipulation or property settlement agreement." 807 F.2d at 878.

The Court further determined that where the parties have entered a written agreement, that "[a] written agreement between the parties is persuasive evidence of intent. *Tilley v. Jessee*, 789 F.2d 1074, 1077 (4th Cir. 1986). Thus, if the agreement between the parties clearly shows that the parties

intended the debt to reflect either support or a property settlement, then that characterization will normally control. On the other hand, if the agreement is ambiguous, then the court must determine the parties' intentions by looking to extrinsic evidence. (citations omitted)." *Yeates, supra* at 878.

In *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986), the Court of Appeals was presented with the question of whether a written agreement between the parties is non-dischargeable alimony. *Id.* at 1077.

The Fourth Circuit reviewed the settlement agreement and the record on appeal, and held that the record was devoid of any evidence that the agreement was anything more than the parties expressed in the original agreement. Therefore, since the intent of the parties was expressed clearly in the original agreement, the agreement would be enforced as written. Id. at 1077-78.

This is clearly the view of other

courts. *See In re Johnson*, 162 B.R. 130 (S.D.Tex. 1993); *Gebhardt v. Gebhardt*, 53 B.R. 113 (W.D.Mo. 1985).

In *Gebhardt v. Gebhardt*, 53 B.R. 113 (W.D.Mo. 1985), the District Court for the Western District of Missouri held in the case of a settlement agreement attached to the divorce of the parties as follows:

"However, the critical issue is to ascertain what the parties intended, and that intention is to be arrived at through the processes of construction and interpretation, not by reformation of the instrument." (emphasis in original). *Id.* at 115.

The *Gebhardt* Court further noted:

"While the Bankruptcy Court may look to the circumstances surrounding the creation of the liability, if the divorce decree is so unambiguous that the intent of the civil court is abundantly clear, this Court cannot overlook its purpose by relying on such factors as the parties physical health or her need for present or future support. (citation

omitted). It is understandable that the Bankruptcy Court was sympathetic to Appellee's disability, but it cannot ignore the plan language of the separation agreement." *Id.*

The decision by the *Dennis* Court of Appeals to decide the issue of whether the characterization of "property settlement" should be construed "in the nature of support" under 11 U.S.C. § 523 (a)(5), is contrary to the decisions of other circuits that have either held that a clearly expressed agreement should not be reformed by the federal courts or that factors extrinsic to the agreement should not be considered unless the court determines first that the agreement is ambiguous.

In the *Dennis* case, the parties entered into a written agreement related to their divorce. Subsequently, the nondebtor, ex-spouse filed a lawsuit against the debtor seeking a judgment for damages arising out of the divorce judgment.

In an agreed consent judgment, the Court of Bexar County, State of Texas, entered judgment against the debtor with the specific language contained in the judgment indicating that the judgment "'was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support'." *Dennis* at 277.

The Court of Appeals in rejecting the application of the doctrine of collateral estoppel did not adopt the standard of either the Fourth Circuit in *Tilley* or the Tenth Circuit in *Yeates*. Rather the Fifth Circuit determined that objective standards outside the judgment apply in the determination of whether a clearly expressed written intent of the parties to the agreement.

The Fifth Circuit has clearly reformed an agreement by applying factors extrinsic to the agreement to determine that a debt characterized as a property division by

agreement of the parties is in fact a debt in the nature of support. The decision rests on these objective factors and does not rest on the subjective intent of the parties in order to determine their true meaning.

However, the Fifth Circuit has recognized the application of an estoppel doctrine to determine that a debt is nondischargeable. In the case of *In re: Davidson*, 947 F.2d 1294 (5th Cir. 1991), the Court of Appeals for the Fifth Circuit did not apply the *In re: Joseph* factors in favor of the "quasi-estoppel" doctrine.

In an detailed analysis of the facts surrounding the execution of a divorce agreement and the intent of the parties at the time of divorce, the United States District Court for the Northern District of Texas affirmed a bankruptcy court ruling that payments designated as alimony were in fact a property division and dischargeable. *In re: Davidson*, 133 B.R. 795 (N.D. Tex. 1990).

On appeal, the Fifth Circuit Court of

Appeals reversed the decision of the district court holding that as a matter of law, a debtor could not discharge an obligation to a former spouse, which was characterized as alimony, where the debtor had treated the obligation as alimony for tax purposes. *In re: Davidson*, 947 F.2d 1294, 1296-97 (5th Cir. 1991). The Fifth Circuit relied on the doctrine of "quasi-estoppel", and reasoned as follows:

> To allow a spouse to set up an intricate and unambiguous divorce settlement, carefully distinguishing certain periodic payments, called alimony, from the division of the marital property, and consistently taking advantage of this characterization for tax purposes, only then to declare that the payments truly represented a division of property, would be a legal affront to both the bankruptcy and tax codes. To uphold the discharge of those payments in bankruptcy would reward an admitted manipulation tantamount, at best, to deception. *Id.*

Yet by not recognizing clearly expressed, unambiguous language of the judgments and divorce settlement agreements as controlling the intent of the parties at the time of divorce, the Court of Appeals for the Fifth Circuit has opened the door for the deceptions that exist. *See In re: Johnson*, 162 B.R. 130, 135 (Bankr.S.D.Tex 1993) (holding that the clear obligations in a divorce decree that establish the debtor's liability to his ex-spouse as maintenance and support should not be varied because the parole evidence rule and the doctrine of integration exist "so that parties may rely on the enforcement of agreements that have been reduced to writing").

In the *Dennis* case, the Fifth Circuit rejected the clear wording of the document and further rejected the application of collateral estoppel and judicial estoppel to preclude the creditor spouse from asserting that the clear language of the agreement should be construed as "in the nature of

support". *In re: Dennis*, at 277-78.

This rejection opens the door to the manipulation that the *Davidson* court found so repugnant as to reject all of the factors that were considered relevant by the bankruptcy court and the district court because without the safeguards of collateral and judicial estoppel, the creditor spouse could indeed negotiate a settlement based on property division only to assert in a bankruptcy proceeding commenced by a debtor spouse that the negotiated property division was actually support and not a property division as agreed, negotiated and clearly characterized.

There are no judicial safeguards to the changes in a clearly expressed, unambiguous agreement between the parties. The application of the doctrine of collateral estoppel would provide the judicial safeguards by preventing a litigant from arguing that a dischargeable agreed property settlement is in fact "in the nature of

support."

2. Whether the doctrine of collateral estoppel should be applied in a dischargeability case arising out of a debt created by a divorce proceeding.

B. APPLICATION OF DOCTRINE OF COLLATERAL ESTOPPEL

By applying the doctrine of collateral estoppel, a bankruptcy court can be obligated to accept as binding the findings and conclusions entered in a state court action, and accept the representations of the parties on the characterization of the property. The application of collateral estoppel would clearly prevent the parties from changing their position on the character of the award of property by a state court and would prohibit a federal court from reforming a clearly worded judgment.

The Fifth Circuit has recognized that collateral estoppel may be invoked to bar relitigation of issues that were decided in a nonbankruptcy court. *See Sheerin v. Davis (Matter of Davis)*, 3 F.3d 113 (5th Cir.

1993); *Matter of Schuler*, 722 F.2d 1253, 1255 (5th Cir. 1984). The Fifth Circuit in *Schuler* noted that collateral estoppel could be used to establish specific facts even though the bankruptcy court had jurisdiction to determine the ultimate question of dischargeability. Further, this Court has reaffirmed the proposition that collateral estoppel can be applied in dischargeability actions. *See Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 658 n.11 (1991).

In *Schuler*, the Fifth Circuit stated the standards for collateral estoppel. In *Schuler* the Fifth Circuit noted:

> The applicability of collateral estoppel thus stated is in accord with the general test for collateral estoppel in this circuit.
>
> > This Court has stated that the three traditional requirements for the application of the doctrine of collateral estoppel are: (*i*) the issue to be precluded must be identical to that involved in the prior action, (*ii*) in

> the prior action the issue must have been actually litigated, and (*iii*) the determination made of the issue in the prior action must have been necessary to the resulting judgment.

White v. World Finance of Meridian, Inc., 653 F.2d 147, 151 (5th Cir. 1981). *Schuler*, 722 F.2d at 1256 n.2; *see Davis*, 3 F.3d at 114.

In the case *sub judice* the Debtor meets the three standards for application of collateral estoppel. These are as follows:

(1) The issue before the bankruptcy court under 11 U.S.C. § 523 (a)(5) is the intent of the parties that the division of the property not be interpreted to be spousal support or alimony, which is the issue before the divorce court. This is the same issue before the state county court.

(2) The consent given by the parties in the judgment in county court that establishes the liability constitutes a

stipulation that the payments were in fact a property division and not for spousal support. Therefore, the character of the division of property establishes the fact of the character of the property division without the need for further litigation to reform the agreement.

(3) The finding that the agreement was not spousal support or alimony was also essential to the State Court Judgment to clarify the nature of the obligation of the Debtor.

The District Court in the case *sub judice* determined that under the Full Faith & Credit Act, 28 U.S.C. § 1738, Texas law on collateral estoppel was applicable. The language under Texas law and in *Schuler* describe essentially similar standards. The District Court enumerated the elements for collateral estoppel under Texas law.

> Under Texas law, a party seeking to invoke the doctrine of collateral estoppel must establish: (1) that the facts sought to be litigated in the

> second action were fully and fairly litigated in the prior action; (2) that those facts were essential to the judgment in the first case, and (3) the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984) cited in *J.M. Muniz. Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541, 544 (5th Cir. 1987).

The standards under Texas law and federal law are essentially the same.

(1) THE JUDGMENT CLEARLY EXPRESSED THE INTENT OF THE PARTIES

In the opinion, the Fifth Circuit quoted the State Court Judgment that Petitioner's agreement to pay the taxes "'was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support.'" *In re: Dennis*, 3 F.3d at 277.

The Court of Appeals further noted that "This language mirrors, almost verbatim, the language in the divorce decree." *Id.*

The language of two separate judgments

courts of the State of Texas have determined that the parties have agreed to a determination that the payments due by the debtor were (and are) a property division and not support.

This clear, unequivocal manifestation of the intent of the parties is the exact same issue that must be decided by the bankruptcy court under 11 U.S.C. § 523 (a)(5).

(2) COLLATERAL ESTOPPEL HAS BEEN APPLIED IN DISCHARGEABILITY CASES INVOLVING CONSENT JUDGMENTS

Despite the requirement that a finding be "actually litigated," courts have accorded collateral estoppel effect to findings in consent judgments entered in state court. Collateral estoppel can be applied to a consent judgment to which a party has agreed.

Consent judgments by their nature relieve the parties of any obligation to present evidence to the court. Furthermore, the Bankruptcy Court did receive the State Court Judgment and Plaintiff's Original

Petition from the State Court Action, which constitute sufficient evidence.

In *Davis*, 3 F.3d at 115, the court considered only court opinions and jury questions in order to give a preclusive effect to a state decision. In relying on *Grogan*, the *Davis* court noted that the Supreme Court recognized the application of collateral estoppel where the plaintiffs used the complaint, the jury instructions, the jury verdict, the district court judgment, the appellate court opinion, and a transmittal letter.

In *In re Lacy*, 947 F.2d 1276 (5th Cir. 1991), a case involving dischargeability, the Fifth Circuit accorded collateral estoppel effect to an agreed judgment in state court. The Fifth Circuit in *Lacy* referred to the "precise facts" in the state court judgment and commented:

> In *Kaspar Wire Works, Inc. v. Leco Engineering and Machine, Inc.*, 575 F.2d 530, 540 (5th Cir. 1978), we explained that "when determining the effect to be given a decree

> entered by consent of the parties, consideration is to be given their intention with respect to the finality to be accorded the decree reflected by the record and the words of their agreement." Here, the intention manifested by the words of the state court judgment is clear. That intention controlled the subsequent bankruptcy proceeding.

Lacy, 947 F.2d at 1277-78. Similarly, the words in the State Court Judgment should control the interpretation of the intent of the parties in the case *sub judice*. *See Yeates v. Yeates*, 807 F.2d 874 (10th Cir. 1986), *Tilley v. Jessee*, 789 F.2d 1074 (4th Cir. 1986).

In Carey Lumber Co. v. Bell, 615 F.2d 370 (5th Cir. 1980), the Fifth Circuit adopted an opinion of the district court in which the district court ruled that a bankruptcy court could determine dischargeability by considering factual findings in a consent judgment in state court. The court noted that the consent judgment contained recitations of findings.

Similarly, the State Court Judgment in

the Dennis case contains specific findings.

The rejection of the use of collateral estoppel by the *Dennis* Court is contrary to decisions in other circuits where collateral estoppel has been applied in dischargeability cases involving consent judgments.

In *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987), the defendant in the state court had stipulated that he disregarded his fiduciary duties as a trustee of a trust and had, through misappropriation and defalcation, allowed or caused the dissipation and loss of the trust corpus and income. The Seventh Circuit applied the doctrine of collateral estoppel, and held that this stipulation from the consent judgment could be used against the defendant in a dischargeability action in bankruptcy court. *See also In re Halpern*, 810 F.2d 1061 (11th Cir. 1987) (In a dischargeability action, collateral estoppel was applied against a party who admitted in a consent judgment facts concerning the party's

misrepresentations, fraudulent deceit, and willful, malicious and intentional conduct.).

The District Court in its District Court Order also explained that collateral estoppel is applied to consent judgments under Texas law.

> Texas courts apply § 27 of the Restatement (Second) of Judgments. *See Texas Real Estate Com'n v. Nagle*, 767 S.W.2d 691, 694 (Tex. 1989). Comment (e) provides that in the case of a judgment entered by confession, consent, or default,
>
> > none of the issues is actually litigated. Therefore, the rule of this § does not apply with respect to any issue in a subsequent action. The judgment may be conclusive, however, with respect to one or more issues, if the Parties have entered an agreement manifesting such an intention.
>
> See Restated (Second) of Judgments, § 27, Comment (e) (1982) (emphasis added).

Indeed, an agreed judgment is more than a mere contract. It has the same degree of finality

> and binding force as one rendered by a court at the conclusion of adversary proceedings. *Forbis v. Trinity Universal Ins.*, 833 S.W.2d 316, 319 (Tex. App.--Ft. Worth 1992 error withdrawn) citing *Barrientes v. Harlandale Ind. School Dist.*, 764 S.W.2d 28, 29 (Tex. App.--San Antonio 1989, writ denied).
>
> The Court finds that the recitations contained in the state court consent judgment evidence the agreement of the parties and their attorneys. The consent judgment was entered by agreement in pursuance of a compromise and settlement and became a judgment on the merits. *See Murray v. Murray*, 611 S.W.2d 172, 174 (Tex. Civ. App.--El Paso, no writ); *Bell v. Moores*, 832 S.W.2d 749, 755 (Tex. App.--Houston [14th Dist.] 1992, writ denied).

Under both federal law and state law, the standards for collateral estoppel have been met.

(3) ESSENTIAL TO STATE COURT JUDGMENT

It is clear that a determination of the issue of whether the debt created by the State Court Judgment was a property division or for support was essential to the judgment. In its opinion, the District Court on appeal reviewed the record and ruled that the

pleadings in the State Court Action demonstrate that the alimony and support issue was essential to State Court Judgment. The District Court found that "the alimony issue was pointedly raised by the state court pleadings in order to clarify the nature of the obligation." In the Plaintiffs Original Petition in the State Court Action, Audrey Dennis sought relief against the Debtor that would require that the Debtor report the gross pension income on the Debtor's tax return and that the Debtor pay the taxes "without deduction for alimony or spousal support payments." Audrey Dennis, therefore, clearly raised the issue of what the nature of the Debtor's obligation would be when the Debtor paid the taxes. The final State Court Judgment in fact required the Debtor to pay the taxes "without deduction for alimony or spousal support payments."

Furthermore, in the Plaintiff's Original Petition in the State Court Action, Audrey Dennis at page 2 represented the

following to the state court: "The Decree of Divorce referred to above provided in part that 'this Judgment is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.'" This language was also incorporated into the State Court Judgment.

(4) PARTIES ADVERSARIES IN THE FIRST ACTION

Finally, under any analysis, it is clear that the parties to the dischargeability action were the same parties who were cast as adversaries in the in the State Court Action, because Audrey Dennis obtained a judgment against the Debtor in that action.

Under both federal law and state law, the Debtor has met the standards for the applicability of collateral estoppel.

(5) APPLICABILITY OF COLLATERAL ESTOPPEL TO § 523(A)(5)

This Court and the Court of Appeals for the Fifth Circuit have clearly determined

that collateral estoppel is a doctrine applicable in dischargeability proceeding. If the standards for collateral estoppel are met, the doctrine cannot simply be ignored in any dischargeability proceeding, whether the proceeding is pursued under § 523(a)(5) or any other provisions of § 523. The bankruptcy court is bound under federal law to give collateral estoppel effect to findings made in state court action.

Furthermore, the Full Faith & Credit Act, 28 U.S.C. § 1738, a state judicial proceeding "shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such State...from which they are taken."

In *United Pac. Ins. Co. v. McClelland (Matter of Troy Dodson Constr. Co.)*, 993 F.2d 1211, 1214 (5th Cir. 1993), the Fifth Circuit, citing the Full Faith & Credit Act with respect to an appeal from a decision of the bankruptcy court, held that the Circuit

must "apply the same standard of collateral estoppel that would be used in state court to determine the preclusive effect of one of its judgments."

C. CONCLUSION

The Petitioner requests that the Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because the decision of the Court of Appeals is contrary to the law as developed by other Circuit Courts of Appeal.

Respectfully submitted,

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LEBARON DENNIS,

PETITIONER

V.

AUDREY DENNIS,

RESPONDENT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX A TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

25 FEDERAL REPORTER, 3d SERIES

In the Matter of Lebaron DENNIS, Debtor

Lebaron DENNIS, Appellee

v.

Audrey H. DENNIS, a/k/a Joyce Dennis, Appellant

No. 93-8613

United States Court of Appeals,
Fifth Circuit

July 13, 1994

Chapter 7 debtor's former spouse brought adversary proceeding to except debt from discharge as allegedly being in nature of "alimony, maintenance or support." The United States Bankruptcy Court for the Western District of Texas entered judgment in favor of wife, and debtor appealed. The District Court,, H.F. Garcia J., reversed. On further review, the Court of Appeals, Johnson, Circuit Judge, held that: (1) former wife was not collaterally estopped from arguing that debtor's obligation to pay taxes on military retirement benefits awarded to her was nondischargeable support obligation,

and (2) obligation could not be discharged as being in nature of alimony, maintenance or support."

Reversed and rendered for wife.

1. **Bankruptcy**

Determination as to whether debtor's obligation to former spouse should be excepted from discharge, as one for alimony, maintenance or support, is matter of federal bankruptcy and not state law. Bankr.Code, 11 U.S.C.A 9 523(a)(5).

2. **Bankruptcy**

In deciding whether debtor's obligation to former spouse should be excepted from discharge, as one for alimony, maintenance or support, bankruptcy courts must look beyond labels which state courts, and even parties themselves, have given to obligation. Bankr.Code, 11 U.S.C.A § 523(a)(5).

3. **Bankruptcy**

Mere fact that creditor has previously reduced claim to judgment does not preclude bankruptcy court, in ruling on

dischargeability of judgment debt, from inquiring into true nature of debt and ruling contrary to first court's judgment, if necessary. Bankr.Code, 11 U.S.C.A § 523(a).

4. Bankruptcy

Debtor's former spouse is not barred from arguing in bankruptcy that debtor's obligations to spouse are nondischargeable support obligations, even though spouse has argued to contrary in state court. Bankr. Code, 11 U.S.C.A § 523(a)(5).

5. Bankruptcy

Ultimate finding as to whether debt is nondischargeable as defined by bankruptcy law is solely within province of bankruptcy court. Bankr.Code, 11 U.S.C.A. § 523(a).

6. Bankruptcy

Only in limited circumstances may bankruptcy courts ignore Congress' mandate to provide plenary review of dischargeability issues and decide question of debt's dischargeability based on principles of collateral estoppel.

7. Judgment

Collateral estoppel applies in bankruptcy dischargeability proceedings only if prior, nonbankruptcy court has made specific, subordinate, factual findings on identical dischargeability issue in question, and only if facts supporting prior, nonbankruptcy court's finding; are discernible from that court's record. Bankr.Code, 11 U.S.C.A § 523(a).

8. Judgment

Chapter 7 debtors former wife was not collaterally estopped from arguing that debtor's obligation to pay taxes on her one half interest in debtor's retirement benefits was in nature of nondischargeable support award, though wife had previously argued in state court proceedings to enforce debtor's obligation that obligation was part of property settlement; question of whether obligation was in nature of "support" for bankruptcy nondischargeability purposes was different from questions raised in prior

state court enforcement action. Bankr.Code, 11 U.S.C.A. § 523(a)(5).

9. Judgment

Basic premise of collateral estoppel doctrine is that issue raised in second tribunal must be identical to issue raised and resolved in prior tribunal.

10. Bankruptcy

Among factors that bankruptcy court considers in deciding whether debtor's obligation to former spouse should be excepted from discharge, as one for alimony, maintenance or support, are: any disparity in parties' earning capacities; parties' relative business opportunities; parties' physical condition; their educational background; their probable future financial needs; and benefits that each party would have received if marriage had continued. Bankr.Code, 11 U.S.C.A § 523(a)(5).

11. Bankruptcy

Chapter 7 debtors' obligation to his former wife of 31 years to pay taxes on that

portion of his military retirement benefits awarded to former wife at time of their divorce was in nature of "alimony, maintenance or support" and could not be discharged in bankruptcy, where wife was 54-year-old woman who had not worked outside the home in more than 28 years, and who had no work skills or job offers, while husband was extremely successful doctor who was earning well over a quarter of a million dollars a year when parties divorced. Bankr.Code, 11 U.S.C.A. § 523(a)(5).

See publication Words and Phrases for other judicial constructions and definitions.

Louis LeLaurin, Marita Emmett, San Antonio, TX, for appellant.

Paul W. Rosenbaum, Rosenbaum Law Services, Noe Reyna, Jack Minyard Partain, Jr., Fulbright & Jaworski, San Antonio, TX, for appellee.

Appeal from the United States District Court for the Western District of Texas.

Before JOHNSON, BARKSDALE, and DeMOSS, Circuit Judges.

JOHNSON, Circuit Judge:

After more than thirty-one years of marriage, LeBaron and Audrey ("Joyce") Dennis divorced. The divorce court awarded Joyce one-half of LeBaron's military retirement benefits, and LeBaron agreed to pay the taxes thereon. Six years after the divorce, LeBaron filed a petition for bankruptcy. He sought a discharge of his obligation to pay the taxes on Joyce's share of the retirement benefits. The bankruptcy court determined that LeBaron's obligation to pay the taxes constituted alimony, maintenance, or support under section 523(a)(5) of the Bankruptcy Code. The bankruptcy court therefore ruled that LeBaron's tax obligation was nondischargeable. The district court, reviewing the case on appeal, reversed. Finding that the bankruptcy court properly ruled that the debt in question was nondischargeable, we reverse.

I. Facts and Procedural History

Joyce and LeBaron Dennis married on December 18, 1954. At that time, LeBaron was a medical student at Harvard Medical School with three semesters remaining until graduation. Joyce obtained a clerk-typist Job to pay for their living expenses. She financially supported the family throughout LeBaron's last three semesters of medical, as well as throughout LeBaron's internship after medical school. Upon completion of his internship, LeBaron entered the Air Force as a physician. He made it clear to Joyce that he did not want his wife - the wife of a doctor - working outside the home. For the next twenty-eight years, therefore, Joyce worked as a full-time wife and mother.

In 1981, LeBaron retired from the Air Force as a full colonel. He then entered into private practice as a plastic surgeon. LeBaron experienced great financial success in the private sector. In 1982, just one year after retirement from the Air Force,

LeBaron more than double his income. In 1985, LeBaron earned well over $284,000 from his medical practice alone. While the Dennis family was reaping significant monetary benefits, they were, at the same time, encountering grave family problems. On July 14, 1985, LeBaron and Joyce separated. They divorced approximately one year later, after more than thirty-one and half years of marriage.

On the day before trial on the divorce issues, LeBaron and Joyce entered into a settlement agreement. Among other things, they agreed that Joyce would obtain fifty percent of LeBaron's military pension. During the settlement negotiations, LeBaron verbally offered to pay all of the taxes due on Joyce's share of the benefits. Because Joyce had no degree, no skills, no job, and no prospects for a job, she accepted the

offer.[1] LeBaron agreed to - and did - memorialize this agreement in a writing.[2]

During the trial before the bankruptcy court, LeBaron testified that he wanted to preserve an interest in Joyce's share of the benefits should she predecease him. LeBaron believed that to preserve such an interest, he was required to have the Air Force deposit all of the funds into his bank account. He therefore offered to pay all of the income taxes due on Joyce's share of the pension if she would give up her right to have the Air Force send the money directly to her and all

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[1] Joyce testified before the bankruptcy court that she agreed to vacate the Dennis' home in one month and allow LeBaron to serve as trustee over the retirement benefits in exchange for LeBaron's agreement to pay the taxes on her share of the pension. Both parties testified that Joyce had no other source of regular income and that the tax-free retirement income was important for Joyce's survival.

[2] LeBaron specifically explained that the agreement to pay the taxes was a part of the divorce settlement. The writing began as follows: "This letter will serve *to restate and clarify the agreement contained in our divorce agreement* ..." Rec. at 50, 52 (emphasis added). He stated that the Air Force would deposit the money into his account; he would provide Joyce one-half of the gross amount received and would pay the income taxes due for all of the benefits.

the Air Force to deposit all of the funds into LeBaron's account instead. Joyce agreed. However, soon after signing the agreement, LeBaron learned that he did not have to have the money deposited into his account in order to preserve his interest in Joyce's share of the benefits. He thus decided not to pay any taxes on Joyce's amount. He instead declared that the benefits given to Joyce constituted alimony and deducted that amount from his gross income on his income tax forms. LeBaron chose not to inform Joyce of these decisions. Hence, she assumed that LeBaron was paying the taxes as required by their agreement.

Joyce learned otherwise in November 1988, when the Internal Revenue Service informed her that she owed taxes, interest, and penalties on all of the retirement benefits she had received in the previous two years. A tax court later found her liable for taxes and interest in the amount of

$19,720.33.[3] Joyce thereafter filed suit against LeBaron in a Texas county court at law for breaching his agreement to pay the taxes on the retirement benefits. In her petition to that court, she quoted her divorce decree which "provided in part that 'this Judgment is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support'" Rec. at 41. Joyce asked the Texas county court to find LeBaron liable for the $19,720.33 and to require LeBaron to specifically perform his duties outlined in the agreement by reporting the gross amount of the retirement benefits as income, by paying the taxes on the gross amount, and by *not* deducting the benefits from his gross income as alimony or spousal support.

The Texas county court, referring to language in the divorce decree, found that

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[3] Because she had acted in good faith, Joyce did not have to pay the penalties.

LeBaron's agreement to pay the taxes "was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support."[4] Rec. at 45. The Texas county court held LeBaron liable for the taxes, ruled that LeBaron was required to pay the taxes in the future, and forbade LeBaron from deducting the military benefits from his gross income and claiming that the benefits constituted alimony or support. The Texas county court signed its judgment, which was actually a consent decree, on Friday, January 3, 1992.

Four days-two working days-later, on Tuesday, January 7, 1992, LeBaron filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. He sought to have his past and future tax obligations to Joyce discharged. LeBaron and his new wife filed a

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[4] This language mirrors, almost verbatim, the language in the divorce decree.

Chapter 13 proceeding in July of 1992. They listed Joyce as one of only two creditors and proposed to make no payments whatever on the taxes due on Joyce's share of the retirement benefits. LeBaron contended that because the Texas county court had found that the obligation did not constitute alimony or spousal support, the doctrine of collateral estoppel prevented the bankruptcy court from finding to the contrary.

The bankruptcy court disagreed. The bankruptcy court ruled that it was bound neither by the characterization which the parties had given the obligation nor by the decision of the Texas county court at law. Reviewing the facts of the case *de novo*, the bankruptcy court found that although the parties and the Texas county court had given the obligation another name, "it still smelled] like alimony or support." The court therefore ruled that LeBaron's duty to pay Joyce's taxes was nondischargeable. LeBaron appealed to the federal district court, and

that court reversed. It ruled that the doctrine of collateral estoppel was applicable in the facts of this case and there fore prohibited the bankruptcy court from finding that the tax payments constituted alimony, maintenance, or support. Joyce now appeals.

II. Discussion

A. The Law Stated

[1] Section 523 of Title 11 sets forth the exceptions to the general rule that all debts are dischargeable through bankruptcy. Subsection (a)(5)(B) is the provision in issue here. It reads:

> A discharge ... of this title does not discharge an individual debtor from any debt to a spouse, former spouse. or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt includes a liabilities designated as alimony, maintenance, or support, unless

> such liabilities is actually in the nature of alimony, maintenance, or support.

11 U.S.C. § 523(a)(5)(B). Since 1970, the determination of whether a debt is nondischargeable under this provision has been a matter of federal bankruptcy law not state law. *Grogan v. Garner*, 498 U.S. 279, 284, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991); *In re Joseph*, 16 F.3d 86, 87 (5th Cir.1994); *In re Biggs*, 907 F.2d 503, 504 (5th Cir.1990); *see also Brown v. Felsen*, 442 U.S. 127, 136. 99 S.Ct 2205, 2211, 60 L.Ed.2d 767 (1979)(stating that "[b]y the express terms of the Constitution, bankruptcy law is federal law").

[2-5] Bankruptcy courts must therefore look beyond the labels which state courts - and even parties themselves - give obligations which debtors seek to have discharged.[5] *In re Davidson*, 947 F.2d 1294,

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[5] This is not only a clearly established principle in this Circuit, but no other circuit to review this issue has ever taken a contrary view. *See, e.g., In re Brody*, 3 F.3d 35, 39 (2d Cir.1993)

1296 (5th Cir.1991); *In re Benich*, 811 F.2d 943, 945 (5th Cir.1987); *In re Nunnally*, 506 F.2d 1024, 1027 (5th Cir.1975). Indeed the mere fact that a creditor previously reduced her claim to a judgment does not preclude the bankruptcy court from inquiring into the true nature of the debt - and ruling contrary to the first court's judgment, if necessary. *Brown* 442 U.S. at 138, 99 S.Ct. at 2212; *In re Brody*, 3 F.3d at 39. In fact, a spouse is not barred from arguing in bankruptcy court that certain obligations constitute alimony or support even if that spouse argued to the

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(deciding that labels given an obligation by the parties or the state court are not dispositive): *In re Sampson*, 997 F.2d 717, 722 (10th Cir.1993)(concluding that the label attached to an obligation does not control); *Adams v. Zentz*, 963 F.2d 197, 199 (8th Cir.1992)(determining that state law or the divorce decree characterization of the debt is not binding on bankruptcy courts); *In re Gianakas*, 917 F.2d 759,762 (3d Cir.1990)(ruling that bankruptcy courts must look beyond the label attached to settlement agreements to find the debt's true nature_; *In re Seibert*, 914 F.2d 102, 106 (7th Cir.1990)(ruling that state law does not control the issue of whether an obligation constitutes alimony, maintenance, or support); *In re Long*, 794 F.2d 928, 930 (4th Cir. 1986)(determining that labels are not controlling); *Stout v. Prussel*, 691 F.2d 859, 861 (9th Cir.1982)(holding that the descriptions which parties give obligations in settlements or decrees are not conclusive).

contrary in state court. *In re Brody*, 3 F.3d at 39. To be sure, "[t]he ultimate finding of whether [a debt is nondischargeable, as 'defined' by the bankruptcy law] is solely [in] the province of the bankruptcy court." *Shuler*, 722 F.2d 1253. 1256 (5th Cir.). *cert.* denied 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984) (quoting *Franks v. Thomason*, 4 B.R. 814, 820-21 (Bankr.N.D.Ga.1980)).

The reason for these well-settled principles is that parties and state courts, as a general rule, do not label obligations with federal bankruptcy standards in mind. Even if a state court reviews an issue which is similar to one created by the nondischargeability provision in the bankruptcy code, the state law concept will likely differ from the specific federal bankruptcy doctrine in question. *Brown*, 442 U.S. at 135, 99 S.Ct. at 2211. This is especially true in cases which require courts to determine the nature of divorce

settlements - and even more so when that question is raised in Teas, which has no such animal as alimony. *In re Joseph*, 16 F.3d at 87; *In re Nunnally*, 506 F.2d at 1027; *see also In re Jones*, 9 F.3d 878, 880 (10th Cir.1993)(ruling that debt may be in the nature of alimony, maintenance, or support under federal bankruptcy law, even though it is not legally qualified as alimony under state law).

[6,7] Hence, in only limited circumstances may bankruptcy courts defer to the doctrine of collateral estoppel and thereby ignore Congress' mandate to provide plenary review of dischargeability issues. Collateral estoppel applies in bankruptcy courts only if, *inter alia*, the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question - that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue -and the facts supporting the court's findings are

discernible from that court's record. *In re Davis*, 3 F.3d 113, 115 (5th Cir.1993); *In re Shuler*, 722 F.2d at 1256. *See In re Comer*, 723 F.2d 737 (9th Cir. 1984)(ruling that bankruptcy courts should not rely solely on state court judgments when determining the true nature of a debt for dischargeability purposes if so doing would prevent the bankruptcy courts from exercising their exclusive jurisdiction to determine whether the debt is dischargeable); *see also Browning v. Navarro*, 887 F.2d 553, 561 (5th Cir.1989) (providing that although the doctrine of res judicata is generally applicable to bankruptcy courts, the contours of the doctrine are "different for bankruptcy courts ... because tasks which have been delegated to [bankruptcy courts] by Congress may not be interfered with by the decisions of other courts ... {B}bankruptcy courts have a job to do and sometimes they must ignore res judicata in order to carry out Congress' mandate").

B. The Law Applied

[8,9] Contrary to the plethora of cases which hold that bankruptcy courts must review for themselves the true nature of an obligation under section 523(a)(5)(B), LeBaron asks this Court to rule that the consent judgment signed by the Texas county court at law collaterally estopped the bankruptcy court here from finding that the tax payments in issue were, in truth , alimony, maintenance, or support. This we cannot do. As explained above, the first and most basic premise in the second tribunal must have been the identical issue raised and resolved in the first tribunal.

Such is not the case here. LeBaron can point to no state court finding or evidence which proves or even intimates that the parties or the Texas county court designed the settlement agreement and consent decree with federal bankruptcy standards in mind. To the contrary, Joyce's complaint and the agreed judgment merely referred to language

in the divorce decree which characterized the property exchange as a property settlement, as opposed to alimony or support. The divorce decree, to be consistent with *Texas law*, could characterize the property distribution as nothing other than a property settlement. Joyce, to be consistent with *Texas law*, could find nothing contrary to Joyce's reference to the divorce decree's provision that the property transfer constituted a property settlement.

However, *federal bankruptcy law*, not Texas law, governs here. The bankruptcy court had neither the option nor the authority to apply state law in the case *sub judice*. That court was instead required to make findings of fact and conclusions of law in accord with federal bankruptcy law - and that is exactly what it did.

[10,11] In *In re Joseph*, this Court set forth a nonexclusive list of factors which bankruptcy courts should review in deciding whether a divorce obligation

constitutes alimony, maintenance, or support. The considerations include the parties' disparity in earning capacity, their relative business opportunities, their physical condition, their educational background, their probable future financial needs, and the benefits each party would have received had the marriage continued. *In re Joseph*, 16 F.3d at 88. The bankruptcy court in this case. reviewing these and other similar factors, recognized that at the time of the divorce, Joyce was a fifty-four year old woman who had not worked outside the home in more than twenty-eight years. She had no job, no job offers, no work skills, and no college education. LeBaron, on the other hand, had an extremely successful medical practice and was earning well over a quarter of a million dollars a year at the time of the divorce. In light of these financial disparities, the bankruptcy court found that LeBaron's obligation to pay the taxes on Joyce's share of the military pension was, in

true nature, alimony, maintenance, or support under section 523(a)(5)(B) of Title 11. The court therefore ruled that LeBaron's debt on the taxes was nondischargeable. Unlike the district court, which did not review the facts of this case in light of bankruptcy law, but instead held that the collateral estoppel doctrine controlled, we find no error in the bankruptcy court's decision.

III. Conclusion

Because the issue decided in the Texas state court was not identical to the issue in question before the bankruptcy court, the doctrine of collateral estoppel is inapplicable in this case. The district courts erred in ruling otherwise. We

REVERSE AND RENDER for Joyce Dennis.

APPENDIX B TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE: LEBARON DENNIS,	§	
	§	Bankruptcy No.
Debtor	§	92-50122
	§	Adversary No.
	§	92-05033
LEBARON DENNIS,	§	
Appellant,	§	
	§	CIVIL NO.
v.	§	SA-93-CA-178
AUDREY H. DENNIS,	§	
Appellee,	§	

ORDER

On this date came on to be considered by the Court an appeal from the bankruptcy court's judgement determining that appellant's obligation to pay all income taxes on military retirement benefits awarded to his ex-spouse by or i connection with a divorce decree was not dischargeable under Title 11 U.S.C. § 523(a)(5).

Debtor/appellant, Dr. Lebaron Dennis, and his wife, Audrey Dennis, obtained a divorce by final decree in the 225th Judicial

District Court of Bexar County, Texas on July 23, 1986. *See Divorce Decree*, Appellant's Brief, Exh. A. The divorce decree provided that Audrey Dennis would receive 50 percent of the gross present and future military retirement benefits received each month by Dr. Dennis. *Id.* at p. 4.

After the divorce, Dr. Dennis agreed to pay income taxes on all military retirement benefits received by his ex-spouse. This agreement was memorialized in writing by three letters written after the Final Divorce Decree. *See Agreement Letters*, Appellant's Brief, Exhs. D, E, and F. The September 8, 1986 and December 22,1986 explanatory letters specifically categorize the income tax accord as an "agreement contained in our divorce agreement" regarding the awarded military pension in the divorce decree. *Id.* Exhs. E and F.

Despite the agreement, Dr. Dennis did not pay the income taxes on military retirement benefits. In 1991, Audrey Dennis

filed suit in County Court at Law No. 8 of Bexar County, Texas based on her ex-husband's failure to pay the income taxes as part of their divorce settlement. Audrey's state court complaint noted that the Divorce Decree provided that the judgment "is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support." *See Plaintiff's Original Petition*, Appellant's Brief, Exh. B, p. 2.

The state court complaint also indicated that Audrey Dennis first learned that her ex-husband had breached his agreement to pay the taxes in November, 1988. At that time, she also learned that Dr. Dennis had reported the payments to her as an alimony or spousal support deduction on his tax return. The amount was then treated as income to Audrey Dennis. *Id.* Exh. B, P. 2-3.

Audrey sought $19,720.33 in damages, representing the additional amounts she had

to pay the Internal Revenue Service on her taxes, professional fees connected thereto, the additional tax she was required to pay by being placed in a higher tax bracket, and interest. *Id.* Exh. B., p. 3. Her complaint also specifically sought a decree requiring LeBaron Dennis to perform his contract, to report the gross pension Income on his tax return, and to pay the tax due thereon "without deduction for alimony or spousal support payments." *Id.* Exh. B., p. 4.

The state court entered a consent judgment on January 3, 1992. *See State Court Judgment*, Appellant's Brief, Exh. C. The Court found that Dr. Lebaron Dennis had breached his agreement to assume responsibility for paying the tax on the gross pension benefit of his income and to report it as his income and pay all taxes due thereon. The Court further found that the agreement was part of the division of community property between the parties and did not constitute nor should it be

interpreted to be any form or spousal support, alimony, or child support. *Id.*

Accordingly, the Court ordered Dr. Dennis to pay damages in the amount or $19,720.33, reasonable attorneys fees in the amount of $8,500.00, pre-judgment and post-judgment interest, and costs of suit. Dr. Dennis was further ordered to report the gross pension income on his tax return and to pay the tax due thereon "without deduction for alimony or spousal support payments." *Id.*

Four days later, Dr. Lebaron Dennis filed for protection under Chapter 7 of the Bankruptcy Code. On February 19, 1992, debtor Dennis filed a complaint to determine the dischargeability of his prior, current and future obligation to pay all income taxes on the military retirement benefits awarded to his ex-spouse in connection with the divorce. See Bankruptcy Complaint, Bankruptcy Record. He claimed that the obligation was dischargeable because the

obligation was a property division rather than alimony, maintenance or support[1]. *Id.*

Audrey Dennis filed counterclaims in the adversary proceeding alleging that the obligation to pay income taxes was nondischargeable as alimony, maintenance or support. She also alleged that the debt was nondischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity. *See First Amended Counterclaim*, Bankruptcy Record.

On October 19, 1992, the bankruptcy court conducted a hearing in the adversary proceeding. After hearing the testimony of Dr. Dennis and Audrey Dennis as well the argument of counsel, Bankruptcy Judge King concluded that the obligations were nondischargeable. *See Transcript*, p. 113.

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[1] Debtor also argued before the bankruptcy court that the Tax agreement was void for lack of consideration and illegal under Internal Revenue Service regulations. This Court finds that the bankruptcy court properly overruled these arguments.

He found that the tax obligation was negotiated by the parties; that the state court judgment provided that the tax agreement was in effect a part of the Divorce Decree; and that she relied on the agreement. *Id.*

The bankruptcy court specifically found that he was not bound by the type of property division characterization given the tax agreement by the consent state court judgment. Judge King indicated that the issue of whether the agreement constituted alimony or spousal support was not actually litigated; that the issue was merely part of an agreed judgment; and that the characterization was placed into the judgment by "some clever lawyers" trying to gain an advantage for their client. *See Transcript*, p. 114.

The bankruptcy court next explained that Audrey Dennis needed the Tax agreement income as maintenance and support; that Mrs. Dennis did not do as well as she should have

under the division of property; and that the Tax agreement income was taken into account in the division of property. *See Transcript*, p. 115-16. He also indicated that no fiduciary duty existed under the Tax agreement so as to render the debt nondischargeable under Title 11 U.S.C. § 523(a)(4)[2].

On October 26, 1992, Bankruptcy Judge King signed a judgment awarding Audrey Dennis the sum of $19,723.33 as previously ordered by the state court judgment with interest thereon from June 15, 1991 until paid. Judge King also awarded Audrey Dennis attorneys' fees in the amount of $8,500.00 as previously ordered by the state court judgment with interest thereon from January 3, 1992 until paid. *See Adversary Proceeding Judgment*, Appellant's Brief, Exhibit G.

The judgment also provided for the assessment of the pertinent military pension

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[2] Bankruptcy Judge King's decision regarding §523(a)(4) was not appealed.

income taxes in the future. The bankruptcy court found that each of said obligations were nondischargeable under Title 11 U.S.C. § 523(a)(5). *Id.* The Court subsequently denied Dr. Dennis' motion for reconsideration on December 18, 1992. This appeal followed.

Appellant asserts that the bankruptcy court committed reversible error by granting judgment in favor of appellee and by denying appellant's motion for reconsideration. Appellant contends that the bankruptcy court erred: 1) by erroneously refusing to give collateral estoppel effect to the Texas state court judgment finding that appellant's agreement to pay taxes on the military retirement benefits did not constitute any form of spousal support or alimony; 2) by improperly concluding that appellant's obligation to pay income taxes on those military retirement benefits was nondischargeable under Title 11 U.S.C. § 523(a)(5); and (3) by inappropriately assessing interest and state court attorneys'

fees.

Appellee Audrey H. Dennis argues that the bankruptcy court properly declined to apply the doctrine of collateral estoppel; that the bankruptcy court correctly found that the nature or the tax obligation was support or maintenance under § 523(a)(5); and that the bankruptcy court properly ruled on the secondary issues of interest and attorney's fees.

Of course, the district court in its appellate role must give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *See In re Perez*, 954 F.2d 1026, 1027 (5th Cir. 1992). Thus, a bankruptcy court's findings will be affirmed unless, on the entire evidence, the court is left with the "definite and firm conviction that a mistake has been committed." *Id. citing Matter of Sutton*, 904 F.2d 327, 329 (5th Cir. 1990). This court will apply the clearly erroneous standard to the bankruptcy court's factual findings;

conclusions of law are reviewed *de novo*. *See* Bankruptcy Rule 8013; *In re Anderson*, 936 F.2d 199, 202 (5th Cir. 1991).

THE ALIMONY DISCHARGE EXCEPTION

The Bankruptcy Code excepts from discharge a debt owed to a former spouse for alimony to, maintenance for, or support of such spouse in connection with a separation agreement, divorce decree, or property settlement agreement if the debt is "actually in the nature of alimony, maintenance or support." *See* Title 11 U.S.C. § 523(a)(5).

The Bankruptcy Code requires the bankruptcy court to determine the true nature of the debt, regardless of the characterization placed on it by the parties' agreement or the state court proceeding. *See Matter of Benich*, 811 F.2d 943, 945 (5th Cir. 1987)(citations omitted). Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of § 523(a)(5) is a matter of federal bankruptcy law, not state law. *See Matter of Biggs*, 907

F.2d 503, 504 (5th Cir. 1990) citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 364, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6320.

The bankruptcy court may, therefore, consider extrinsic evidence to determine the real nature of the underlying obligation in order to determine its dischargeability. Relevant evidentiary factors include earning power disparity, educational background, and future need for support. *Matter of Benich*, 811 F.2d at 945 *citing In re Nunnally*, 506 F.2d 1024, 1026 (5th Cir. 1975). The Fifth Circuit has indicated, however, that its *Benich* holding does not negate the doctrine of estoppel. *See Matter of Davidson*, 947 F.2d 1294, 1297 (5th Cir. 1991)(applying quasi-estoppel).

COLLATERAL ESTOPPEL

The United States Supreme Court has held that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to Title 11 U.S.C. §

523(a)[3]. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 658 and fn. 11 (1991) *citing* Restatement (Second) of Judgments § 27 (1982) *and In re Shuler*, 722 F.2d 1253, 1256 (5th Cir.) *cert. denied sub nom Harold V. Simpson & Co. v. Shuler*, 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984).

The consent state court judgment recited that the Tax Agreement was part of the division of community property settlement between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony, or child support. Under Title 11 U.S.C. § 523(a)(5), the bankruptcy court was required to decide that identical issue.

It is well settled that the Full Faith and Credit Act, Title 28 U.S.C. § 1738, requires federal courts to accord a state court judgment the preclusive effect which it

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[3] Appellee's argument that collateral estoppel does not apply to subsection Z 523(a)(5) is unpersuasive.

would have under state law. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed2d 56 (1984) *as cited in Schuster v. Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988)(applying Mississippi law of collateral estoppel).

Under Texas Law, a party seeking to invoke the doctrine of collateral estoppel must establish: (1) that the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) that those facts were essential to the judgement in the first case, and (3) the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984) *cited in J.M. Muniz, Inc. v. Mercantile Texas Credit Corp.*, 833 F.2d 541, 544 (5th Cir. 1987).

The Court finds that the instant parties were the opposing litigants in the pertinent state court action. Audrey Dennis's state court complaint specifically sought a decree requiring LeBaron Dennis to

perform his contract, to report the gross pension income on his tax return, and to pay the tax due thereon "without deduction for alimony or spousal support payments." *See Plaintiff's Original Petition*, Appellant's Brief, Exh. B, P. 4. Since the alimony issue was pointedly raised by the state court pleadings in order to clarify the nature of the obligation, this Court finds that resolution of that issue was certainly essential to the state court judgment.

Texas courts apply Section 27 of the Restatement (Second) of Judgments. *See Texas Real Estate Com'n v. Nagle, 767 S.W.2d 691, 694 (Tex. 1989).* *Comment (e) provides that in the case of a judgment entered by confession, consent, or default,*

> *None of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.* The judgment may be conclusive, however, with respect to one or more issues, if the parties have entered an agreement manifesting such an intention.

See Restatement (Second) of Judgments, § 27, Comment (e) (1982)(emphasis added).

Indeed, an agreed judgment is more than a mere contract. It has the same degree of finality and binding force as one rendered by a court at the conclusion of adversary proceedings. *Forbis v. Trinity Universal Ins.*, 833 S.W.2d 315, 319 (Tex. App.- Ft. Worth 1992 error withdrawn*) *citing Barrientes v. Harlandale Ind. School Dist.*, 754 S.W.2d 28, 29 (Tex. App.- San Antonio 1989, writ denied).

Nearly five years after her divorce, Audrey Dennis specifically sought a decree in County Court at Law requiring her ex-husband to perform his contract, to report the gross pension income on his tax return, and to pay the tax due "without deduction for alimony or spousal support payments." *See Plaintiff's Original Petition*, Appellant's Brief, Exh. B. The resultant state court consent judgment indicated that the tax agreement was part of the division of community property between

the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony, or child support. *See State Court Judgment*, Appellant's Brief, Exh. C.

The Court finds that the recitations contained in the state court consent judgment evidence the agreement of the parties and their attorneys. The consent judgment was entered by agreement in pursuance of a compromise and settlement and became a judgment on the merits. *See Murray v. Murray*, 611 S.W.2d 172, 174 (Tex. Civ. App.- El Paso, no writ); *Bell v. Moores*, 832 S.W.2d 749, 755 (Tex. App.- Houston [14th Dist.] 1992 writ denied).

The Fifth Circuit has held that when determining the effect to be given a decree entered by consent of the parties, consideration is to be given to their intention with respect to the finality to be accorded the decree as reflected by the record and the words of their agreement.

Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc., 575 F.2d 530, 540 (5th Cir. 1978). This Court finds that the intention manifested by the words of the consent judgment is clear. *See In re Lacy*, 947 F.2d 1276, 1278 (5th Cir. 1991) (Under certain conditions, an agreed judgment is entitled to collateral estoppel effect in discharge proceedings).

The Dennis' Divorce Decree provided that the division or property did not constitute alimony. Five years later, Audrey Dennis specifically sought a declaration in state court that her tax agreement with her ex-husband did not constitute alimony. She obtained a consent judgment to that effect. After her ex-husband declared bankruptcy, Audrey Dennis sought yet another bite at the apple.

The pertinent legal authorities indicate that courts should accord some degree of finality to consent judgments when they contain specific findings. After

thorough consideration, this Court concludes that the bankruptcy court should have given collateral estoppel effect to the state court consent judgment finding that appellant's agreement to pay taxes on the military retirement benefits did not constitute any form of spousal support or alimony.

Accordingly, for the reasons set forth herein as well as those arguments presented by the appellant, this Court hereby REVERSES AND RENDERS the bankruptcy court's October 26, 1992 order.

The obligation of LeBaron Dennis to pay taxes on pension benefits received by Audrey Dennis under the Judgment entered in Cause No. 198503 in County Court at Law Number 8 of Bexar County, Texas is hereby DISCHARGED.

SIGNED this 12th day of August, 1993.

H. F. GARCIA

UNITED STATES DISTRICT JUDGE

APPENDIX C TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF _____

LEBARON DENNIS

V. **JUDGMENT IN A CIVIL CASE**

AUDREY H. DENNIS

CASE NUMBER SA-93-CA-178

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court **REVERSES** and **RENDERS** the Bankruptcy

Court's order of 10/26/92. The obligation of LeBaron Dennis to pay taxes on pension benefits received by Audrey Dennis under the Judgment entered in Cause No. 198503 in County Court at Law Number 8 of Bexar County, Texas, is hereby DISCHARGED.

August 12, 1993
Date

CHARLES W. VAGNER
Clerk

(By) Deputy Clerk

APPENDIX D TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:

LEBARON DENNIS, CASE NO. 92-50122-K

DEBTOR CHAPTER 7 CASE

LEBARON DENNIS,

PLAINTIFF

VS. ADVERSARY PROCEEDING NO. 92-5033

AUDREY H. DENNIS, a/k/a

JOYCE DENNIS,

DEFENDANT

JUDGMENT

On the 19th day of October, 1992, came on for consideration PLAINTIFF'S FIRST AMENDED COMPLAINT TO DETERMINE DISCHARGEABILITY and DEFENDANT'S FIRST AMENDED COUNTERCLAIM OF AUDREY H. DENNIS, a/k/a JOYCE DENNIS. Plaintiff appeared in person and through his attorney, Paul W. Rosenbaum. Defendant appeared in person and

through her attorneys, Robert L. Barrows and Marita Emmett. The Court proceeded to call the case for trial and both parties announced ready. The Court proceeded to hear and determine Plaintiff's Complaint and Defendant's Counterclaim on the dischargeability of Plaintiff's obligation to any all income taxes on the military retirement payments awarded to Defendant by or in connection with their divorce decree. After consideration of the pleadings, evidence and arguments of counsel, it is, accordingly

ORDERED, ADJUDGED and. DECREED that Defendant, Audrey H. Dennis, have and recover of and from Plaintiff, LeBaron Dennis, the sum of $19,723.33, as previously ordered by the state court judgment, together with interest thereon at the rate of eighteen percent (18%) per annum from June 15, 1991 until paid. It is further

ORDERED, ADJUDGED and DECREED that Defendant, Audrey H. Dennis, have and recover

of and from Plaintiff, LeBaron Dennis, an additional sum of $8,500.00, as previously ordered by the state court judgment, together with interest thereon at the rate of ten percent (10%) per annum from January 3, 1992 until paid. It is further

ORDERED, ADJUDGED and DECREED that defendant, Audrey H. Dennis, have and recover of and from Plaintiff, LeBaron Dennis, all income taxes accruing against Defendant Audrey H. Dennis's military retirement payments as of June 16, 1991 through the current date, to be assessed at the highest rate applicable to the total income of Audrey H. Dennis, together with interest thereon at the rate of ten percent (10%) per annum from the date of this Judgment until paid. It is further.

ORDERED, ADJUDGED and DECREED that Audrey H. Dennis shall have and recover of and from Plaintiff, LeBaron Dennis, all income taxes, federal and state, on Defendant's military retirement benefits

received by her after October 19, 1992, calculated at the highest tax rate applicable to the total income of Audrey H. Dennis to be paid on at least a quarterly basis by Plaintiff, LeBaron Dennis, on or before the 15th day of the month following the end of each quarter of the fiscal year, and, if not paid by that time, that the obligations of Plaintiff to Defendant shall bear interest at the rate of ten percent (10%) per annum. It is further

ORDERED, ADJUDGED and DECREED that, if the Internal Revenue Service or any other taxing authority assesses at any time any additional taxes, interest or penalties against Audrey H. Dennis attributable to her military retirement payments, that she have and recover of and from Plaintiff, LeBaron Dennis, all such sums, plus interest at the rate of ten percent (10%) per annum until paid. It is further

ORDERED ADJUDGED and DECREED that all sums awarded to Defendant, Audrey H. Dennis,

by the terms of this Judgment shall be and remain excepted from any discharge in bankruptcy of Plaintiff, LeBaron Dennis, in that the amounts evidenced by this Judgment represent nor-dischargeable obligations under the provisions of 11 U.S.C. § 523(a)(5), in accordance with the Court's findings made at the trial of this Adversary Proceeding. It is further

ORDERED, ADJUDGED and DECREED that Defendant, Audrey H. Dennis, shall have all writs and processes necessary to enforce this Judgment against Plaintiff, LeBaron Dennis.

SIGNED this 26th day of October, 1992.

Ronald B. King, United States Bankruptcy Judge

APPENDIX E TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

I have nothing further, your Honor.

THE COURT: Okay. For the record, these are my findings of fact and conclusions of law.

I think the obligations are non-dischargeable, first of all. I think the taxes were originally part of the deal, taxes on the pension of--the military pension. I think it was a trade-off, a negotiated tern during the divorce negotiations on the day of and day prior to the Divorce Decree, that a judgment form the County Court at Law provides that the letter is in effect a part of the Divorce Decree and amends it by the consent of the parties. Dr. Dennis wrote the letter himself and it purports to expand the obligations under the Divorce Decree. Mrs. Dennis testified that it's part of the negotiating process, that she probably would have agreed to the Divorce Decree without, but that it was in effect a chip that was given up in the negotiating give and take.

For Dr. Dennis' own reasons, he elected

to pay the income tax on her portion, whether it was for her benefit or whether it was for his benefit. But in either event, he agreed to it; she relied on that and she didn't pay the taxes. Obviously after that, he didn't pay the taxes either and the I.R.S. came in and discovered the situation and required her to pay the taxes.

As far as the characterization of whether or not it's division of property or alimony, maintenance and support, those two are mutually exclusive and, obviously, the documents are well drafted by able attorneys stating that they're division of property. But we're not bound by that. If they tried, actually tried the issue of is this alimony, maintenance and support or division of property, it wasn't actually litigated; this was an agreed judgment that this was not an issue that was litigated; it's just something that some clever lawyers put in there to try to give an advantage to their client, obviously.

These types of recitations are not binding on us. The old expression, if it walks like a duck and quacks like a duck and looks like a duck, then it probably is a duck. I mean, if it says it's a chicken but it's a duck, then it's a duck. I think Shakespeare said, a rose by any other name would smell as sweet, or someone changed that and said, you can change the name but you can't change the smell. Well, here you can change the name of this, but it smells like alimony or support.

Mrs. Dennis needed this, in my opinion. Dr. Dennis had a very high earning capacity. She paid his way in part through medical school; he also had assistance from his parents, but she paid their living expenses, according to the testimony. She was a homemaker, a mother and a wife for approximately 30 years. She had no marketable job skills except as a clerk. She helped him to obtain a high paying position as a surgeon, and in--by forgoing her own

career. She obviously had the opportunity thereafter to go back to school, for whatever reason she chose not to, probably because of the family. But in any event, the dye was cast at that point.

The agreement was made by the parties. Unfortunately, it's up to me-- I didn't make the agreement, I wasn't a party to it, I wasn't there--but it's up to me to determine the effect of it and the characterization of it. There's a case from the Fifth Circuit in 1975 called In Re: Nunnelly that I think is the most instructive case in this area. It's all--it's actually under the Bankruptcy Act but it still applies, the reasoning of it still applies. And Nunnelly said that, in Texas, we obviously don't have involuntary alimony, under the case of Francis vs. Francis; but even in a case where the parties don't agree on the property settlement and the court imposes the property settlement, there can be an element of maintenance and support merely in the division of the

property. And the fact that the parties agreed to it, I don't think changes that. I think that the maintenance and support obligation was there. I think that it was taken into account in the division of property.

She didn't really do as well as she should have under the division of property, to be perfectly blunt. I don't think that she cut a very good deal. And so, I'm very hesitant to find that this a part of a bad deal that's dischargeable and that, despite the fact that he made the agreement for his own benefit as well as her agree--as well as her benefit, that now it's dischargeable as division of property.

As far as 523 (A) (4), I would find there is not a fiduciary duty under the agreement. It establishes a constructive trust, that says what it says; but there are cases that say there has to be an express trust and I don't think that there is an express trust here, and a breach of contract

by him failing to pay the taxes is not a breach of fiduciary duty in the sense of 523 (A) (4).

If the I.R.S. prohibits him from including in his income her half of the military pension, then she can include it in her income. But he has to pay her income tax on that income to her, and that would also be at her highest marginal rate. In other words, if she makes $20,000 form her job and she's paid 20,000 in the military pension, she's responsible for the taxes on the first 20,000, which would be at the lowest rate obviously, he would be responsible for the taxes on the top 20,000, which would be at a slightly higher rate.

I don't think that Davidson is exactly on point. In Davidson, the husband claimed that it was division of property but he deducted the payments as alimony, maintenance and support, and so Judge--the Fifth Circuit, relying on Judge Clark's opinion in Robinson in part, said that it's non-dischargeable

because he's estopped to claim otherwise. He treated it as non-dischargeable by deducting his alimony. Here he deducted it as alimony but it was not--it was never intended for him to get the benefit of it and then deduct it. He was just supposed to pay taxes on all of it and she was to get half, so I don't think that that's exactly on point.

But for the record, I would find that it's non-dischargeable under 523 (A) (5), the judgment that is in State Court is non-dischargeable. The future obligations are non-dischargeable and , in effect, since this is a declaratory judgment and I think that it's a live dispute which is--it's a good faith dispute, I'll put it that way, I'm going to award any attorney's fees in addition to those previously awarded.

So I'll ask Mr. Barrows to prepare the judgment in favor of the Defendant, Mrs. Dennis; that are non-dischargeable under 523 (A) (5). And those are my findings and conclusions for the record, and they need not

be restated in the judgment itself.

MR. BARROWS: Thank you, your Honor. (Indiscernible) provide an order.

THE COURT: All right. Thank you, you tried a good case.

We're be in recess.

THE ERO: All rise.

(Court in recess at 4:25 p.m.)

* *

APPENDIX F TO

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 198503

AUDREY H. DENNIS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER 8
	§	
LeBARON W. DENNIS	§	BEXAR COUNTY, TEXAS

JUDGMENT

On the _____ day of _____, 199__, came on to be heard the above-entitled and numbered cause, wherein Audrey H. Dennis is Plaintiff and Dr. LeBaron W. Dennis is Defendant. Plaintiff and Defendant appeared by and through their respective attorneys of record and announced to the Court that all matters of fact and things in controversy between them are being fully and finally compromised and settled through the entry of this judgment. The Court makes the following findings and orders:

The Court finds that the Dr. LeBaron Dennis breached his agreement to assume responsibility for paying the tax on the gross pension benefit of his income and to report it as his income and pay all taxes due thereon.

The Court finds that the agreement was part of the division of community property between the parties and did not constitute nor should it be interpreted to be any form of spousal support, alimony or child support.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that DR. LEBARON DENNIS report the gross pension income on the tax return and pay the tax due thereon for the gross pension income without deduction for alimony or spousal support payments.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that Audrey H. Dennis, Plaintiff, have and recover of and from Dr. LeBaron Dennis, Defendant, the sum of NINETEEN THOUSAND SEVEN HUNDRED TWENTY AND 33/100 ($19,723.33).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that Audrey H. Dennis, Plaintiff, have and recover of and from Dr. LeBaron Dennis, Defendant, as reasonable attorney's fees the sum of EIGHT THOUSAND FIVE HUNDRED AND 00/100 ($8,500.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, by the Court that Audrey H. Dennis, Plaintiff, shall have and recover pre-judgment and post-judgment interest on her damages at the legal rate and that Plaintiff shall recover costs of suit.

The parties are allowed such writs and processes as may be necessary in the collection or enforcement of this judgment. All relief not expressly given is denied.

SIGNED this _____ day of _____, 199__.

_____
JUDGE PRESIDING

APPROVED:

_____
Bobby D. Myers

_____
Robert D. Ulman

APPENDIX G TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 93-8613

D.C. Docket No. SA-93-CV-178

IN THE MATTER OF: LEBARON DENNIS,

Debtor,

LEBARON DENNIS,

versus

AUDREY H. DENNIS,
a/k/a Joyce Dennis,

Appellant.

Appeal from the United States District Court for the Western District of Texas

Before JOHNSON, BARKSDALE, and DeMOSS, Circuit Judges.

J U D G E M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that

the judgment of the District Court in this cause is reversed, and judgment is rendered for Joyce Dennis.

IT IS FURTHER ORDERED that appellee pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

July 13, 1994

ISSUED AS MANDATE: August 4, 1994